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No. 90-1037

In The

Supreme Court of the United States

October Term, 1990

JOHN MOORE,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, DAVID W. GOLDE, M.D., SHIRLEY G. QUAN,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of California

RESPONDENT SHIRLEY G. QUAN'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, on a petition for writ of certiorari to the Supreme Court of California, this Court has jurisdiction to address a claim that the petitioner's bodily tissue is property that was taken by the state without just compensation in violation of the Fifth Amendment, when that question was neither properly raised in nor decided by the state court.

2. Whether, on a petition for writ of certiorari to the Supreme Court of California, there is a final judgment providing this Court with jurisdiction to address a claim that the petitioner's bodily tissue is property that was taken by the state without just compensation in violation of the Fifth Amendment, when the California Supreme Court: (a) remanded the case to the trial court for, *inter alia*, an evidentiary hearing which will determine whether the petitioner gave a fully informed consent to any alleged taking of his bodily tissue; and (b) held that the allegations in petitioner's complaint that respondents conspired with one another to remove his bodily tissue without his consent are deficient and must be amended upon remand of the case to the trial court.

3. Whether the Supreme Court of California's determination that there is no property interest in excised human tissue rests on a fair and substantial basis, precluding a claim for just compensation under the Fifth Amendment Takings Clause, when: (a) a contrary determination would deter vital medical research; and (b) a patient's rights can be protected through a state law claim for breach of fiduciary duty.

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REGENTS OF THE UNIVERSITY OF CALIFORNIA, DAVID W. GOLDE, M.D., SHIRLEY G. QUAN,

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Petition For Writ Of Certiorari To The Supreme Court Of California

RESPONDENT SHIRLEY G. QUAN'S BRIEF IN OPPOSITION

Respondent Shirley G. Quan respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of California entered on July 9, 1990 in this case. That opinion is reported at 51 Cal.3d 120, 271 Cal. Rptr. 146, 793 P.2d 479 (1990).

STATEMENT OF THE CASE

Petitioner John Moore ("Moore"), who was gravely ill with a condition known as hairy cell leukemia, sought treatment from respondent Dr. David W. Golde ("Golde"), a physician employed by respondent the Regents of the University of California ("the Regents") at the Regents' U.C.L.A. Medical Center. In order to save Moore's life, Golde recommended a splenectomy, i.e., the removal of his spleen. Golde requested the surgical team to provide him with a portion of Moore's excised spleen. He then directed respondent Shirley G. Quan ("Quan"), a medical researcher employed by the Regents at the U.C.L.A. School of Medicine, to conduct studies on that tissue.[1] Those studies eventually lead to the development of a cell line from Moore's excised tissue which may prove beneficial to other patients suffering from similar ailments. The Regents thereafter applied for a patent on that cell line, listing Golde and Quan as co-inventors.

When Moore learned of the existence of the cell line, he instituted an action in California state court against the Regents, Golde, Quan and various pharmaceutical companies. He purported to allege state court claims for, *inter alia*, conversion and breach of fiduciary duty based on respondents' alleged failure to disclose that one of their purposes in removing his spleen was to have access to it for nontherapeutic purposes. All causes of action were predicated on Golde's alleged duty, as Moore's treating physician, to fully disclose the purposes of

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[1] Contrary to the assertion in the petition (Pet. 3), Moore never alleged that Golde and Quan had determined prior to the operation that his cells were unique and extremely valuable.

proposed medical procedures. Because Quan was not a physician and therefore had no personal duty to obtain Moore's informed consent, liability against her was predicated on allegations she conspired with Golde to obtain his bodily tissue without providing full disclosure. None of Moore's claims asserted any right under the United States Constitution or any federal statute.

The trial court sustained respondents' demurrers to Moore's complaint with leave to amend and, when he declined to amend, dismissed the action. The California Court of Appeal reversed, ruling that Moore had a property interest in his excised bodily tissue and that he had adequately alleged a cause of action for conversion under state law. The California Supreme Court granted review and affirmed in part and reversed in part the decision of the California Court of Appeal. It held:

1. Moore could maintain a cause of action for breach of fiduciary duty against Golde, his treating physician, if he could prove at trial that Golde failed to inform him of Golde's research and economic interests before obtaining Moore's consent to the removal of his bodily tissue;

2. Moore's allegations that the remaining defendants, including Quan, conspired with Golde and were therefore also liable for breach of fiduciary duty, were "egregious examples of generic boilerplate" and required amendment before Moore could go to trial against those defendants on his breach of fiduciary duty claim; and

3. Moore could not state a cause of action for conversion because he did not possess a property interest in his excised tissue under existing California law and

compelling public policy considerations counseled against extending California law to recognize a property interest in such tissue.

The California Supreme Court remanded the case to the trial court for further proceedings consistent with its opinion.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THIS COURT IS WITHOUT JURISDICTION TO ADDRESS MOORE'S JUST COMPENSATION CLAIM BECAUSE IT WAS NEITHER RAISED IN NOR DECIDED BY THE STATE COURT.

This Court has repeatedly held that unless a federal question has been properly "raised and decided" or "pressed or passed upon" in the state court it will decline to address that issue, as either a matter of jurisdiction or as a prudential restriction. *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. ___, ___, 108 S.Ct. 1645, 1651 (1988); *Illinois v. Gates*, 462 U.S. 213, 218-19 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); 28 U.S.C.A. § 1257(a) (West Supp. 1990). "It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.' " *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987) (quoting *Webb v. Webb*, 451 U.S. 493, 496-97 (1981)). The policy reasons for this longstanding rule – comity to the states and practical considerations including a need for a properly developed record on appeal, *see Webb v. Webb*, 451 U.S. at 500-01;

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-35 (1940) – apply with special force when, as here, "difficult issues of great public importance are involved."[2] *Illinois v. Gates*, 462 U.S., at 224; *see also Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. at ___, 108 S.Ct. at 1651.

"Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 512 n. 7 (1978); *see also Parker v. North Carolina*, 397 U.S. 790, 798 (1970); *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 313 n. 6 (1968), as explained in Justice Harlan's dissent, at 334-36 ("[W]hen a defendant has failed to comply with such a rule [regarding the preservation of an issue in state court] 'the argument cannot be entertained here under an unbroken line of precedent' "); *Edelman v. California*, 344 U.S. 357, 358-59 (1952).

"[W]hen . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can

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[2] As we illustrate in section III, *infra*, Moore's Fifth Amendment claim raises a difficult issue of great public importance. That claim requires a finding that Moore possessed a property interest in a cell line created from his excised tissue. However, the recognition of a property interest in that cell line would have disastrous effects on medical research, as innocent medical researchers could then be held liable for conversion if they conducted research on bodily tissue which had been removed from a patient without his or her informed consent.

affirmatively show the contrary." *Street v. New York*, 394 U.S. at 582; *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. at 550; *Webb v. Webb*, 451 U.S. at 496. Here, Moore acknowledges that the California Supreme Court failed to pass on the applicability of the Fifth Amendment. *See* Pet. 13 n. 14. As we show, the assumption the California Supreme Court did not address that issue because it had not been properly presented in conformity with California law is confirmed by the record.[3]

First, Moore failed to argue in opposition to respondents' demurrers to his complaint in the trial court that the alleged conversion of his bodily tissue and fluids constituted a taking of his property without just compensation.[4] The California appellate courts " 'will ordinarily not consider . . . erroneous rulings . . . where an objection could have been but was not presented to the lower court by some appropriate method. . . . ' " *Doers v. Golden Gate Bridge etc. Dist.*, 23 Cal.3d 180, 184-85 n. 1, 151 Cal.Rptr. 837, 838-39 n. 1, 588 P.2d 1261 (1979). Moore's failure to

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[3] In fact, the California Supreme Court expressly refused to address Sandoz Pharmaceutical Corporation's contention the Regents took Moore's cells pursuant to the power of eminent domain, noting, *inter alia*, that Sandoz had failed to raise the issue in the lower courts. 51 Cal.3d at 147-48 n. 44; Pet. App. 36a n. 44.

[4] Indeed, Moore's state court complaint did not allege his property had been taken without just compensation. *See* Pet. App. 101a-148a. The failure to include such an allegation in his complaint precludes this Court from considering his Fifth Amendment claim. *Jones v. Hildebrandt*, 432 U.S. 183, 186, 189 (1977); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50 (1959); *Louisville & N. R. Co. v. Woodford*, 234 U.S. 46, 51 (1914).

raise this issue in the trial court therefore precluded its consideration by the California Court of Appeal.

Second, Moore did not argue in his briefs in the California Court of Appeal that his property had been taken without just compensation (*see* Res. App. 69a-226a) and he failed to raise that contention as an additional issue presented for review in his answer to the petitions for review in the California Supreme Court (*see* Res. App. 239a-242a). Nor was the issue raised in any of the petitions for review. *See* Res. App. 227a-238a. The California Supreme Court therefore could not consider the issue. *See* CAL. R. CT. 29(b)(1) ("As a matter of policy, on petition for review the [California] Supreme Court normally will not consider: (1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal"); CAL. R. CT. 28 ("(5) . . . The answer of a party opposing review may request the court to consider additional issues if review is granted as to any or all issues raised in the petition. An answer stating additional issues shall conform to the requirements of paragraph (2)").[5]

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[5] Moore contends he advanced his just compensation claim in his answer brief on the merits in the California Supreme Court. Pet. 11, 13-14. Not so. In that brief, Moore made only a cursory, isolated assertion that his property had been taken without due process of law, not that it had been taken without just compensation. Pet. App. 97a. Moreover, even if Moore had argued in his brief in the California Supreme Court that he had been deprived of his property without just compensation, the California Supreme Court could not have considered the claim given his failure to raise it in either his briefs in the California Court of Appeal or in his answer to respondents' petitions for review. CAL. R. CT. 28(5), 29(b)(1).

Third, Moore's assertion of the just compensation issue for the first time in his petition for rehearing in the California Supreme Court was untimely. Under California procedure, contentions raised for the first time in a petition for rehearing will not be considered. *People ex rel. Dept. of Public Works v. Mascotti*, 206 Cal.App.2d 772, 780, 24 Cal.Rptr. 679, 680 (1962); *City of San Marino v. Roman Catholic Archbishop*, 180 Cal.App.2d 657, 679, 4 Cal.Rptr. 547, 561 (1960). The California Supreme Court's denial of Moore's petition for rehearing without comment confirms that his assertion of the Fifth Amendment issue was untimely under California procedure and precludes this Court from considering his claim. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1944).

Moore's contention he was not required to raise his Fifth Amendment claim until the California Supreme Court held he could not maintain a state law conversion action is without merit. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), cited by Moore for this remarkable proposition, holds no such thing. In *Williamson*, the successor-in-interest to a land developer contended that a county planning commission had taken its property without just compensation by refusing to approve a proposed development on the land. This Court held only that the just compensation claim was not "ripe" for adjudication until the developer had unsuccessfully utilized the state's inverse condemnation procedure in an effort to seek compensation for any alleged taking.

Williamson does not change the settled rule that this Court will not address a federal question that has not been pressed or passed upon in state court. Although a

federal constitutional claim may not be ripe for adjudication until a litigant has been denied relief under state court procedures, the litigant is not relieved of the obligation to raise his or her constitutional claim at the outset of the state court proceedings, so that the issue may be passed on by the state court in the event it denies relief under state law.

Thus, even where, as in *Williamson*, a state has a recognized procedure for seeking just compensation for the taking of property, this Court has consistently refused to address federal issues until it has first satisfied itself that they had been properly raised in the course of the state court proceedings. Accordingly, in *Bailey v. Anderson*, 326 U.S. 203, 205-07 (1945) this Court found it had no jurisdiction to consider a just compensation claim which had not been raised in a state court condemnation proceeding. It stated:

> Appellant . . . insists that the state court judgment failed to include in the award interest from the date of the occupation of his land by appellee; that the award thus denied to him just compensation for the land taken, in violation of the due process clause of the Fourteenth Amendment. . . . Appellant's petition in the [state] court asked that the award include interest from the date of taking. The [state] court, without explanation, rejected his claim for interest. But throughout the proceedings in the [state] court appellant made no claim to interest on constitutional grounds, and made no attack on the constitutionality of the award or the court's decree because of the asserted denial of interest. . . . Appellant, for the first time, assailed on constitutional grounds the asserted denial of interest by his assignments of error in the State Supreme

> Court of Appeals. . . . Inspection of the record does not show that, in denying the writ of error, the state court passed upon any constitutional question not raised or passed upon in the course of the proceedings below . . . Unless this affirmatively appears upon the record brought here for review on appeal, this court is without jurisdiction of the appeal.

See also First Lutheran Church v. Los Angeles County, 482 U.S. 304, 313 n. 8 (1987) (jurisdiction to hear Fifth Amendment claim found where, even though state court inverse condemnation suit invoked only state constitution, property owner raised federal just compensation claim in state court of appeal, which addressed claim on merits. "Having succeeded in bringing the federal issue into the case, appellant preserved this question on appeal to the Supreme Court of California, . . . which declined to review its Agins decision. Accordingly, we find that the issue urged here was both raised and passed upon below"); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n. 5 (1980) (jurisdiction to consider Fifth Amendment just compensation claim found where the claim had been raised and considered by state supreme court).

The need to first raise the Fifth Amendment just compensation claim in state court was particularly compelling under the facts of this case. From the inception, respondents argued Moore could not state a cause of action for conversion because he did not possess a property interest in his excised tissue.[6] Res. App. 24a-28a.

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[6] *Cf. Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (no dispute that the

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Moreover, no prior state court decision had sanctioned a conversion action based on the misappropriation of excised human tissue. 51 Cal.3d at 137; Pet. App. 19a. Given the uncertainty whether Moore even possessed a state law remedy, he should have raised his just compensation claim at the outset of the state court proceedings, thereby affording the state courts the opportunity to address that claim in the all-too-likely event his state law conversion claim would be rejected. Because he failed to give the state courts the opportunity to pass on that claim, it is too late for Moore to now ask that it be considered by this Court.

Indeed, because this Court's " 'only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights' " (*Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981)), it is difficult to determine why Moore contends the judgment of the California Supreme Court is erroneous. Even if Moore had asserted in his briefs in the California Court of Appeal and the California Supreme Court that he had been deprived of his property without just compensation (he did not), the fact remains that his complaint purported to allege only causes of action under state tort law. Because the California Supreme Court is the final arbiter of state tort law, its determination that Moore had failed to allege a cause of action for conversion under state law (the only issue it

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developer had a property interest in its real property or that an owner of real property could bring an inverse condemnation action to obtain just compensation for the taking of that property).

could decide given the allegations of his complaint) is not subject to review by this Court. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977) (this Court has no jurisdiction to correct a judgment which rests on an "independent and adequate state ground"). The California Supreme Court had no occasion to adjudicate, correctly or incorrectly, Moore's federal rights because he never purported to allege a cause of action based on the United States Constitution or a federal statute.

II.

BECAUSE THE CALIFORNIA SUPREME COURT REMANDED THE CASE TO THE LOS ANGELES COUNTY SUPERIOR COURT FOR FURTHER PROCEEDINGS, THERE IS NO FINAL DECISION WHICH CAN BE REVIEWED BY THIS COURT.

Under 28 U.S.C.A. § 1257(a) this Court has jurisdiction to review only "[f]inal judgments or decrees." This statute has generally been interpreted " 'to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.' " *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. at 124). The finality requirement "serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art[.] III [7];

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[7] As this Court explained:

It has long been this Court's "considered practice not to decide abstract, hypothetical or contingent

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[and] (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota Pharmacy Bd. v. Snyder's Store*, 414 U.S. 156, 159 (1973).

Here there is no final judgment because the California Supreme Court reversed the trial court's ruling on defendants' demurrers, in part, and remanded the case for further proceedings.[8] *See, O'Dell v. Espinoza*, 456 U.S. 430 (1982) (no final decision where Colorado Supreme Court remanded case for trial); *Gospel Army v. Los Angeles*,

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> questions, or to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . " *Public Workers v. Mitchell*, 330 U.S. 75, 90 n. 22; *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 510 (1975) (Rehnquist, J., dissenting).

[8] The California Supreme Court issued the following directions:

> The case is remanded to the Court of Appeal, which shall direct the superior court to: (1) overrule Golde's demurrers to the causes of action for breach of fiduciary duty and lack of informed consent; (2) sustain, with leave to amend, the demurrers of the Regents, Quan, Sandoz, and Genetics Institute to the purported causes of action for breach of fiduciary duty and lack of informed consent; (3) sustain, without leave to amend, all defendants' demurrers to the purported cause of action for conversion; and (4) hear and determine all defendants' remaining demurrers. 51 Cal.3d at 148; Pet. App. 36a-37a.

331 U.S. 543, 546 (1946) (no final judgment where California Supreme Court reversed and remanded case for a new trial); *Missouri & K.I.R. Co. v. Olathe*, 222 U.S. 185, 186 (1911) (no final judgment where Kansas Supreme Court's decision sustaining demurrer did not preclude amendment to petition); *Cincinnati S. R. Co. v. Snell*, 179 U.S. 395, 397 (1900) ("a judgment reversing a case and remanding it for . . . further proceedings of a judicial character, is totally wanting in the requisite finality required . . . "); *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 610 (1892) (no final judgment where Minnesota Supreme Court affirmed an order overruling a demurrer).

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, this Court identified four discrete categories in which a state court's determination of a federal issue has been treated as a final judgment even though further proceedings are mandated in the lower state court.[9] Moore does

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[9] The four categories established by *Cox* are:

(1) "[C]ases in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479.

(2) Cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decisions regardless of the outcome of future state court proceedings." *Id.* at 480.

(3) Cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review

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not suggest this case fits into any of those categories and none appears applicable. Indeed, further proceedings in the trial court will resolve at least two crucial issues upon which Moore's just compensation claim depends.

First, Moore's just compensation claim is predicated on the allegation respondents failed to inform him of their research and economic interests when they obtained his consent for removal of his bodily tissue. Therefore, on the remand directed by the California Supreme Court, the trial court must determine whether Moore knew of those interests and consented to the removal of his tissue notwithstanding that knowledge. If he did, no unconstitutional taking would have occurred and any opinion by this Court would be advisory. *See San Diego Gas & Elec. v.*

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ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." *Id.* at 481.

(4) Cases "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.* at 482-83.

City of San Diego, 450 U.S. 621, 633 (1981) (finding "further proceedings are necessary to resolve the federal question whether there has been a taking at all" and concluding the lower court's decision was not final); *see also Minnick v. California Dept. Of Corrections*, 452 U.S. 105, 127 (1981) (finding "because of significant developments in the law – and perhaps in the facts as well – and because of significant ambiguities in the record . . . we conclude that we should not address the constitutional issues until the proceedings in the trial court are finally concluded and the state appellate courts have completed their review of the trial court record") (footnote omitted).

Second, Moore's claim against Quan depends on his ability to establish she conspired with Golde to remove Moore's bodily tissue without his informed consent. (Only Golde, Moore's treating physician, was authorized and obligated to inform him of the purposes of the medical procedures performed on him.) However, in remanding the case to the trial court, the California Supreme Court held that Moore's complaint had to be amended (51 Cal.3d at 148; Pet. App. 36a-37a) because his conspiracy allegations against Quan are "egregious examples of generic boilerplate. . . . [¶] Nowhere in the third amended complaint does Moore specifically allege that any defendant other than Golde knew that Moore had not received adequate disclosures." 51 Cal.3d at 134 n. 12; Pet. App. 14a-15a n. 12. If, following the remand to the trial court, Moore is unable to correct the deficiencies in his complaint identified by the California Supreme Court, any decision by this Court regarding Quan's potential liability

under the Fifth Amendment Takings Clause would be advisory only.[10]

III.

THE PETITION SHOULD BE DENIED BECAUSE THERE WAS A FAIR AND SUBSTANTIAL BASIS FOR THE CALIFORNIA SUPREME COURT'S CONCLUSION THAT MOORE DID NOT HAVE A PROPERTY INTEREST IN HIS EXCISED TISSUE.

Moore has no claim under the Fifth Amendment Takings Clause unless he possessed a property interest in his excised tissue. However, "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 161, quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also Bishop v. Wood*, 426 U.S. 341, 345 (1976) (the existence of "an enforceable expectation of continued public employment," a property right, was determined by state law). The California Supreme Court's determination that Moore did not have a property interest in his excised tissue must be upheld so long as it rests on a "fair and substantial basis." As this Court

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[10] Moreover, Moore's failure to satisfy state procedural rules regarding the allegation of a conspiracy constitutes an adequate and independent state ground for the California Supreme Court's decision which precludes review by this Court. *Michigan v. Tyler*, 436 U.S. at 512 n. 7; *Parker v. North Carolina*, 397 U.S. at 798; *Edelman v. California*, 344 U.S. at 358-59.

explained in *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944):

> [T]he [state] Court of Appeals disposed of their cases on the ground that appellants have never possessed under New York law such a property right as they claim has been taken from them. If this is the case, appellants have no question for us under the Due Process Clause. . . . "[I]t is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. . . . [I]f . . . the nonfederal ground of decision has fair support, . . . this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court." (footnote omitted).[11]

Citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, Moore argues that the California Supreme Court

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[11] In *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), the Sixth Circuit applied these principles in the course of addressing a plaintiff's 42 U.S.C. § 1983 claim that a county coroner removed her deceased husband's corneas without due process and in violation of the Equal Protection Clause. (The plaintiff did not make a just compensation claim.) To resolve the issue, the Sixth Circuit looked to state law, explaining that "[t]o determine whether [plaintiff's] interest in her husband's corneas rises to the level of a 'legitimate claim of entitlement' protected by the due process clause, we must examine the laws of the state of Ohio. . . . State supreme court decisions are the controlling authority for such determinations." The Sixth Circuit concluded that the plaintiff's right under state law to dispose of her husband's body was a "legitimate claim of entitlement" protected by the Due Process Clause. Here, however, the California Supreme Court held Moore had no legitimate expectation of a right to possession of his bodily tissue following its removal.

impermissibly refashioned state property law to deny him compensation to which he would otherwise be entitled under the Fifth Amendment Takings Clause. Moore's argument begs the question. *Webb's* held only that *once* a private property interest is recognized by the state, it is protected by the Fifth Amendment Takings Clause. Specifically, in *Webb's* the state attempted to avoid paying just compensation for the taking of accrued interest on interpleader funds by recharacterizing the principal as "public money" because it was temporarily held by the court. This Court rejected the attempt, holding that " 'a state by *ipse dixit*, may not transform private property into public property without compensation.' " *Id.* at 164; *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985) ("While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, *once conferred*, without appropriate procedural safeguards." (emphasis added)); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property, the Court has emphasized, is an individual entitlement *grounded in state law*, which cannot be removed except 'for cause.' " (emphasis added)).

These decisions have no application here because the California Supreme Court found there was no property interest in excised bodily tissue under existing California law (51 Cal.3d at 136-42; Pet. App. 18a-28a),[12] and refused

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[12] " 'To establish a conversion, plaintiff must establish an actual interference with his *ownership or right of possession* . . . . Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot

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to expand California law to create a hitherto nonexistent property right in such tissue. 51 Cal.3d at 142-47; Pet. App. 28a-36a. The California Supreme Court's conclusion that there is no property interest under state law is entitled to deference by this Court. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97, 111 (1980) ("[T]his Court accords 'respectful consideration and great weight to the views of the state's highest court' on matters on state law"). Although Moore denigrates the California Supreme Court's analysis as lacking a "substantial basis in either logic or law" and resting on "obvious *non sequiturs*" (Pet. 14), he fails to even mention the public policy considerations relied upon by that court to support its decision. However, those considerations are significant and compelling and establish that the California Supreme Court's conclusion rests "upon a fair and substantial basis." *Demorest v. City Farmers Trust Co.*, 321 U.S. at 42.

Specifically, the California Supreme Court explained that recognition of a property interest in excised bodily tissue would have a devastating effect on medical research because it would "threaten with disabling civil liability innocent parties who are engaged in socially

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maintain an action for conversion.' " 51 Cal.3d at 136; Pet. App. 18a. The California Supreme Court expressly noted that the Uniform Anatomical Gift Act, Cal. Health & Safety Code § 7150, et seq., relied on by Moore to support his contention he had a property interest in his excised tissue, does not permit the donor of a transplantable organ to receive "valuable consideration" for the transfer. Cal.Health & Safety Code § 7155 (West Supp. 1990); *see* 51 Cal.3d at 137 n. 22; Pet. App. 19a n. 22.

useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes." 51 Cal.3d at 143; Pet. App. 29a. This is so because under state law, conversion of property is a strict liability tort in which questions of good faith, lack of knowledge and motive are ordinarily immaterial. 51 Cal.3d at 144 n. 38; Pet. App. 30a n. 38. Therefore, a finding that excised tissue was property "would impose liability on all those into whose hands the cells come, whether or not the particular defendant participated in, or knew of, the inadequate disclosures that violated the patient's right to make an informed decision." 51 Cal.3d at 144; Pet. App. 30a-31a. Under Moore's theory, "with every cell sample a researcher purchases a ticket in a litigation lottery. Because liability for conversion is predicated on a continuing ownership interest, 'companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists'. . . . In our view . . . '[i]t is not unreasonable to conclude in these circumstances that the imposition of a harsher test for liability would not further the public interest in the development and availability of these important products.' " 51 Cal.3d at 146; Pet. App. 33a-34a.

Moreover, the California Supreme Court explained that "there is no pressing need to impose a judicially created rule of strict liability since enforcement of physician's disclosure obligations will protect patients against the very type of harm with which Moore was threatened." 51 Cal.3d at 147; Pet. App. 35a-36a. "Liability based upon existing disclosure obligations, rather than an

unprecedented extension of the conversion theory, protects patients' rights of privacy and autonomy without unnecessarily hindering research." 51 Cal.3d at 144; Pet. App. 30a.

In short, the California Supreme Court did not, by *ipse dixit*, refashion state property law to deprive Moore of an established property interest – it decided, on the basis of settled law and sound public policy considerations, that there was not and should not be a property interest in excised tissue. Because the California Supreme Court's decision rests on a fair and substantial basis, it is not subject to review by this Court.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

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